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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ADVENT COMPANIES, INC., Plaintiff and Appellant, v. PHILADELPHIA INDEMNITY INSURANCE CO., Defendant and Respondent.	G056064 (Super. Ct. No. 30-2016-00888700) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Ostergar Law Group, Treg A. Julander; Edward M. Picozzi for Plaintiff and Appellant.

Hodel Wilks, Matthew A. Hodel and Fred L. Wilks for Defendant and Respondent.

* * *

Advent Companies Inc. (Advent) appeals from the trial court's adverse judgment after a court trial on Advent's first amended complaint against Philadelphia Indemnity Insurance Co. (Surety or Philadelphia) to enforce a bond Surety issued on behalf of a property developer that Advent sued. In the action against the developer, Advent received in a judicial reference a net award exceeding $400,000, but the developer paid that amount in full before it was entered as a judgment in that action.

In this action, the court concluded that because Surety's payment duty under its bond was conditioned on nonpayment by the principal, Surety had no obligation to pay Advent any outstanding sums because Advent established none. Put simply, because the developer had paid the underlying judgment even before it was entered in Advent's action against the developer, Surety had no payment obligation in this action.

Advent argues it was entitled to costs in the underlying action against the developer and contends the court here abused its discretion in declining to consider those costs as a basis for recovery against Surety or to reopen the case after the close of evidence for Advent to present evidence of those costs. As we explain, however, the record shows Advent declined Surety's pretrial request to stay this action or to relate it to the underlying matter against the developer, and instead elected to proceed to trial on its claims against Surety under the bond. The court therefore did not err in deciding the case on the record Advent presented. Advent's other challenges to the court's decision similarly fail. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because we cannot improve upon the trial court's detailed ruling summarizing the relevant facts and procedural posture for its decision, we excerpt it here in pertinent part. Having "reviewed the parties' briefs and having considered oral argument," the court set forth its decision as follows: "This case was tried before the

court without a jury on October 24, 2017. The parties agreed there was no dispute of fact. [¶] . . . [¶]

"FACTS: Plaintiff Advent was the general contractor on a project known as Vistara, an apartment complex in Ontario California. The owner developer was SJC II/Fourth and Haven, L.L.C. During the course of the project a dispute arose between Advent and SJC concerning how much money was owed to Advent for work on the project. On 5/17/16 Advent filed suit against SJC for breach of contract and related causes of action in OCSC case no. 2016-00852678.

"The contract between Advent and SJC contained a dispute resolution provision in which the parties agreed to resolve disputes by judicial reference. The parties thus stipulated to the appointment of the Honorable Steven Sundvold, Ret., of JAMS. Judge Sundvold rendered his amended statement of decision on July 7, 2017, essentially awarding Advent $400,772.45. Judge Sundvold found there was no prevailing party in the underlying action and did not award attorney fees or pre-judgment interest.

"Judgment was entered in the 2678 action on September 15, 2017, in the amount Judge Sundvold awarded to Advent, $400,772.45. Before the judgment was even entered, SJC paid the full amount of the judgment to Advent on September 8, 2017.

"While the underlying case between Advent and SJC was pending, Advent served a stop payment notice on SJC's construction lender, U.S. Bank, on November 11, 2016, pursuant to Civil Code § 8500 et seq. Thereafter, Advent filed this separate action against U.S. Bank to enforce the stop payment notice pursuant to Civil Code § 8550 et seq. In order to free-up its construction fund SJC posted a release bond (pursuant to Civil Code § 8510) issued by defendant Philadelphia Indemnity dated January 5, 2017. Thereafter U.S. Bank was dismissed and this case proceeded against the surety, Philadelphia Indemnity.

"The bond, issued by Philadelphia, provides that: '. . . the condition of this obligation is such, that if the Claimant in this matter shall receive judgement (sic) in any

action brought on said claim, the Principal shall pay said judgement (sic) and costs to Claimant, in an amount not exceeding the sum specified in this undertaking, then this obligation shall be null and void. . . .' The [maximum] sum specified in the bond was $553,750.00.

"DISCUSSION: In this action to enforce the stop payment notice, plaintiff Advent seeks to recover only interest pursuant to Civil Code § 8560, the premium paid for the stop payment bond, and costs. Advent admits that the damages suffered by Advent have already been voluntarily paid by SJC. If plaintiff prevails, it intends to file a post judgment motion for attorney fees seeking attorney fees not only for the prosecution of this action, but also for prosecution of the underlying action against SJC, which was disallowed by Judge Sundvold.

"Defendant's position is that the bond is no longer available to claimant Advent because it was a conditional bond, pursuant to Civil Code § 8154(c). A condition to recovery on the bond is that the claimant '. . . has not been paid the full amount of the claim.' Since all agree that SJC did in fact pay the full amount of Advent's claim on September 8, 2017, the condition has not been met, and Advent can no longer pursue recovery on the bond.

"The court agrees with defendant. While the language of the bond is somewhat arcane, and the condition language of the statute is framed in the negative, the court interprets the word 'claim' in both the bond and the statute to mean the underlying claim Advent had against SJC. The purpose of the release bond was to make sure there would be funds available to pay Advent's claim if [U.S. Bank's] construction funds were depleted and SJC defaulted. SJC did not default, it paid the amount awarded in the underlying judgment. Since Advent's claim was paid, there is no longer any need to pursue the bond.

"It is true that Civil Code § 8560 entitles a claimant to interest in a stop payment enforcement action such as this, but only if the 'claimant is the prevailing party'

in the stop payment enforcement action. Here, claimant cannot be the prevailing party because the condition of the bond has not been met, i.e., that claimant '. . . has not been paid the full amount of the claim.' More directly, since the claimant has already been paid, the bond is no longer in effect. Awarding Advent interest and costs in order to make it the prevailing party would be putting the proverbial cart before the horse.

"Advent was free to seek interest, attorney fees and costs in the underlying action, to the extent they were available under the law.

"Since the trial of this matter took less than eight hours and neither party requested a statement of decision before the matter was taken under submission, there will be no further statement of decision. [¶] Defendant to prepare judgment."

Advent subsequently filed a motion for new trial or, in the alternative, to reopen the case to present new evidence of its costs in the underlying action against SJC. The trial court denied the motion, and Advent now appeals.

DISCUSSION

Advent contends the trial court erred in entering judgment for Surety because Advent was entitled under Surety's bond and related statutory law to its costs in the underlying action against SJC. Those costs had not yet been entered by the trial court in Advent's underlying action against SJC at the time of trial here on Advent's action against Surety on its bond. Instead, the judgment in the underlying action simply included a blank for costs.[1] Because no evidence showed those costs had been paid during the pendency of this action against Surety, Advent argues Surety's obligations under its bond had not been fulfilled. As such, Surety was not entitled to judgment in Advent's lawsuit here.

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[1] Specifically, the judgment stated that Advent "shall recover from [SJC] statutory costs pursuant to Code of Civil Procedure section 1033.5 in the amount of $_____, which includes the cost of the judicial reference."

To clarify the timeline of events: The referee in the underlying action between Advent and SJC entered his reference award on May 26, 2017, which the trial court entered as the judgment in that action on September 15, 2017. The parties agree SJC paid the reference award in full on September 8, 2017, before it was entered as the judgment. The record in this matter does not show the trial court's blank cost award was ever filled in. The trial court entered its ruling denying Advent's claim in this action on October 25, 2017, and entered its ensuing judgment on January 5, 2018.

Advent sought to recover funds from Surety in this action under the terms of the release bond Surety issued in January 2017 to lift the effect of the stop payment notice Advent had filed back in November 2016, which had triggered a halt to SJC's access to funds from its construction lender, U.S. Bank. Surety's release bond issued in January 2017 stated that "***if*** the Claimant [Advent] in this matter shall receive judgement [*sic*] in any action brought on said claim, the Principal [SJC] shall pay said judgement [*sic*] ***and costs*** to Claimant, in an amount not exceeding the sum specified in this undertaking, ***then*** this obligation shall be null and void." (Italics and bold added.) Advent therefore argues that Surety's obligation on its bond could not be "null and void" under this language because Surety presented no evidence to the trial court here that it or SJC had paid the *costs* in Advent's underlying action against SJC.

Advent similarly invokes a statutory provision referenced in Surety's bond, Civil Code section 8510, subdivision (b),[2] which provides for bonds to "be conditioned [on] payment of any amount not exceeding the penal obligation of the bond that the claimant recovers on the claim, *together with costs* of suit awarded in the action." (Italics added.)

While Advent presents its appellate challenge in strictly legal terms, under which our review of a bond's contractual terms and our review of statutory language

[2] All further statutory references are to the Civil Code unless noted.

ordinarily are both de novo (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390; *Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1124), the fact remains that Advent presented no evidence of outstanding costs SJC failed to pay in the underlying action. Indeed, Advent presented no evidence at all. We therefore review whether Advent met its burden as the plaintiff on its cause of action in the first amended complaint against Surety for "Recovery on [Surety's] Stop Payment Notice Bond."

Advent contends that *Surety* bore a burden of proof to show its bond obligation had been exonerated. Advent relies on general authority that exoneration of a bond is an affirmative defense and the party asserting an affirmative defense bears the burden of proof to prevail on it. (*Standard Oil Co. v. Houser* (1950) 101 Cal.App.2d 480, 488.) Advent also relies on what it characterizes as an admission in oral argument below after both parties declined to present any evidence. Specifically, Advent notes that defense counsel acknowledged to the trial court: "[Advent] just filed their bill of costs the—the other day. That will be decided in the underlying action; and whatever judgment—whatever is added to the judgment per the bill of costs, we, of course, are going to pay that.

Advent's claim that the costs issue requires reversal of the judgment is without merit. As the plaintiff, Advent bore the burden of proof on its cause of action in the first amended complaint against Surety to recover on the bond Surety issued. "[T]he plaintiff normally bears the burden of proof to establish the elements of his or her cause of action." (*Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 234.) Evidence Code section 500 establishes that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

Here, Advent's bond recovery claim essentially asserted a cause of action for breach of contract. As the trial court observed, the terms of the bond under which Advent was attempting to recover against Surety stated that Surety's payment obligation

was conditional. Specifically, the bond stated "the condition of this obligation is such, that if the Claimant [Advent] in this matter shall receive judgement [*sic*] in any action brought on said claim, the Principal [SJC] shall pay said judgement [*sic*] and costs to Claimant . . . , then this obligation shall be null and void . . . ." The trial court reasonably could construe this language to require failure by SJC to pay amounts due as a precondition to Surety's payment obligation.

In any event, Advent cannot surmount on appeal a more fundamental obstacle. As Surety observes, "the trial court recognized at oral argument, . . . as Surety's counsel pointed out without any objection by Advent, [that] prior to trial the parties agreed that there was no factual dispute and [the] evidence was closed. [Record citation.] Advent made a tactical decision to rely upon the record reflected in the trial exhibits. There was no evidence at trial of any costs awarded in the SJC Action."

As a result, Advent failed to produce any evidence to support a cost award, even assuming for the sake of argument that Surety had an obligation to pay costs in the first instance. Surety highlights that "Advent knowingly tried this case without any evidence of costs awarded in the SJC Action." The absence of evidence is dispositive here.

Advent argues the trial court erred in declining to grant its reconsideration motion to reopen the case to present evidence. "A motion to reopen . . . can be granted only on a showing of good cause." (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793.) Such a decision rests in the trial court's sound discretion, and cannot be overturned on appeal absent a "clear showing of abuse." (*Ibid*.) Advent in its motion offered no evidence that any costs were due. The moving party's diligence or lack thereof in presenting the new evidence, as well as the significance of the evidence are factors for the trial court's consideration. (*People v. Homick* (2012) 55 Cal.4th 816, 881.)

Advent filed its motion in November 2017 and apparently no cost award in the underlying SJC action had been entered by that date. Consequently, it remained true at that time that Advent had not addressed its failure to present any evidence of outstanding unpaid costs. Advent never sought a continuance of this action to await a cost award in the SJC action. To the contrary, Advent opposed Surety's pretrial request to stay this matter pending the outcome of the SJC action. The trial court acceded to Advent's opposition to stay the case or to coordinate it with the SJC action as a related matter.

The record also shows that, in the parties' pretrial list of controverted issues to be resolved at trial, Advent addressed "interest" and "attorneys' fees" but not costs. In this posture, the trial court did not abuse its discretion in denying Advent's motion for a new trial or to reopen the case to present evidence Advent still could not produce. As the trial court observed at the hearing on Advent's motion, "[Y]ou could have asked for a continuance or waited [until] the cost issues were resolved, but you wanted to go forward." The court did not err in denying the motion.

Apart from costs, Advent argues the trial court erred in concluding it was not the prevailing party in this action because the court should have concluded Advent was entitled to interest and attorney fees to enforce payment of the underlying claims in its November 2016 stop payment notice. Surety notes that it did not issue the release bond that is the subject of this action until January 2017.

Surety also responds that Advent was not the prevailing party in this action and contends that, in any event, much of Advent's recovery in the underlying SJC action was *not* covered by Surety's bond. Specifically, Surety asserts its bond covered unpaid construction expenses Advent incurred on the Vistara project akin to those covered by mechanics' liens, namely, Advent's own labor and materials costs, *not* Advent's recovery in the judicial reference of project delay damages or Advent's share of costs savings on the overall Vistara project under Advent's contract with SJC. Surety observes that these

two items of damages constituted the bulk of Advent's damages award in the SJC action: $265,499.24 for delay damages (offset partially by SJC's $18,500 in liquidated damages for Advent's delays) and $43,773.21 as Advent's share of costs savings.

Surety argues that Advent's recovery in the judicial reference of $110,000 in "Retention" damages, which consisted of periodic payment sums SJC withheld from Advent during the course of construction, were the only damages potentially covered by its bond. Surety also argues that because nothing was due under its bond after SJC paid the net $400,000 judgment due to Advent in the underlying SJC action in full, Advent could not be deemed the prevailing party in this action to recover on Surety's bond.

Advent premises its right to interest and attorney fees—despite SJC's full payment—on two statutory provisions. The first, related to interest, provides: "If the claimant is the prevailing party in an action to enforce payment of the claim stated in a bonded stop payment notice, any amount awarded on the claim shall include interest at the legal rate calculated from the date the stop payment notice is given." (Civ. Code, § 8560.) Second, on the issue of attorney fees for the prevailing party in this action, Advent relies on section 8558, subdivision (a), which provides: "In an action to enforce payment of the claim stated in a bonded stop payment notice, the prevailing party is entitled to a reasonable attorney's fee in addition to costs and damages."[3]

These statutory provisions do not aid Advent. By their terms, they apply to "an action to *enforce payment* of the claim stated" in an underlying stop payment notice. (Italics added.) Here, Surety's bond limited its obligation to payment on a "judgement

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[3] The two cases on which Advent relies do not pertain to or cite these statutory provisions and therefore do not constitute authority for statutory provisions not at issue in them. (*Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, disapproved of by *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107, fn. 5; *Liton Gen. Engineering Contractor, Inc. v. United Pacific Insurance* (1993) 16 Cal.App.4th 577.) *Scott* and *Liton* are also distinguishable because they involved enforcement of payment obligations on public construction projects that are unlike the private party contracts at issue here.

[*sic*] in any action brought on said claim," and the underlying judgment in the SJC action did not include interest or attorney fees at all, let alone under sections 8560 or 8558, respectively. Advent in the SJC action did not seek interest or attorney fees under those statutory provisions. Instead, Advent sought interest as a penalty under statutes requiring prompt progress payments on construction projects (§§ 8800, 8818), which the referee denied because there was a good faith dispute over the amount due. By the same token, Advent sought attorney fees in the SJC action under its contract with SJC, not under the Civil Code section it now invokes.

Finally, the right to interest and attorney fees under sections 8560 and 8558 accrues to the prevailing party in an action to enforce payment. On the record presented here, the trial court correctly concluded no payment was due; in other words, there was nothing to enforce. Consequently, the court correctly entered judgment in Surety's favor. Indeed, while the right to interest under section 8560 belongs only to the claimant prevailing in an action to enforce payment, the right to attorney fees under section 8558 applies to the prevailing party in the enforcement action, regardless of whether the prevailing party is the claimant or the party defending against payment. Thus, attorney fees have been awarded to a construction lender that successfully defends against a stop payment notice claim. (*Mechanical Wholesale Corp. v. Fuji Bank, Ltd.* (1996) 42 Cal.App.4th 1647.) The trial court here did not award Surety attorney fees for its successful defense against Advent's payment enforcement claim, and we do not consider whether it would have been proper to do so.

DISPOSITION

The judgment is affirmed. Surety is entitled to its costs on appeal.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.